

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF WASHINGTON

3

4 UNITED STATES,

5 Plaintiff,

6 v.

7 MAURILIO RIVERA-LARA,

8 Defendant.

9 No. CR-04-237-FVS

10

11 ORDER DENYING DEFENDANT'S  
12 MOTION

13 Before the Court is Defendant's Motion to Vacate, Set Aside, or  
14 Correct Sentence by a Person in Federal Custody under 28 U.S.C. §  
15 2255 (Ct. Rec. 48) filed May 8, 2006.

16 On February 4, 2005, the Defendant pleaded guilty to the offense  
17 of being an alien in the United States after deportation. (Ct. Rec.  
18 21). On April 28, 2005, the Court sentenced the Defendant to 46  
19 months imprisonment and three years of supervised release. (Ct. Rec.  
20 29). On May 2, 2005, the Defendant filed an appeal with the Ninth  
21 Circuit Court of Appeals. (Ct. Rec. 32). While his direct appeal  
22 was pending, Defendant filed the present motion.

23 "Except under most unusual circumstances ... no defendant in a  
24 federal criminal prosecution is entitled to have a direct appeal and  
25 a section 2255 proceeding considered simultaneously in an effort to  
26 overturn the conviction and sentence." *Jack v. United States*, 435  
F.2d 317, 318 (9th Cir. 1970). Thus, absence exceptional

1 circumstances, district courts must refrain from hearing the section  
2 2255 motions of appellants whose direct appeals of their convictions  
3 are still pending. See *Nemec v. United States*, 184 F.2d 355 (9th  
4 Cir. 1950); *cf. Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir.  
5 1987) (stating that a "district court *should not* entertain a habeas  
6 corpus petition while there is a direct appeal pending in [the court  
7 of appeals] or in the Supreme Court" because the disposition of the  
8 appeal may render the petition unnecessary). Consequently, the Court  
9 must dismiss the Defendant's motion because of the pendency of his  
10 appeal before the Ninth Circuit. Assuming he does not petition the  
11 Supreme Court for certiorari, Defendant can make a new section 2255  
12 motion at the expiration of his direct appeal. Accordingly,

13           **IT IS HEREBY ORDERED** that the Defendant's Motion to Vacate, Set  
14 Aside, or Correct Sentence by a Person in Federal Custody under 28  
15 U.S.C. § 2255 (**Ct. Rec. 48**) is **DENIED**.

16           **IT IS SO ORDERED.** The District Court Executive is hereby  
17 directed to enter this Order and furnish copies to the **Defendant** and  
18 his counsel.

19 ||| **DATED** this 14th day of June, 2006.

s/ Fred Van Sickle  
Fred Van Sickle  
United States District Judge